Tuan Mat bin Tuan Ismail v Etiqa Takaful Bhd (previously known as Takaful Nasional Sdn Bhd)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO D-02(NCVC)(A)-158–01 OF 2013
ZAHARAH IBRAHIM, ANANTHAM KASINATHER AND MAH WENG KWAI JJCA
17 DECEMBER 2014

Land Law — Charge — Validity of — Chargor sought to declare charge null and void on ground chargee was neither 'bank' nor 'financial institution' listed under Kelantan Malay Reservations Enactment 1930 and Kelantan Land Enactment 1938 to whom charge could be made — Whether chargor's contention untenable as said laws listed corporation by which chargee was formerly known as entity to whom land in Kelantan could be charged — Whether chargee was also 'financial institution' based on definition of 'Takaful' in Takaful Act 1984 — Whether charge valid and enforceable

The appellant charged two lots of his land ('the lands') to the respondent to secure the latter's loan to a third party. When the respondent obtained an order for sale of the lands, the appellant applied to the High Court by way of an originating summons ('OS') to declare the charge invalid and to set aside the order for sale. The appellant contended the charge was null and void because the restriction in interest on the titles to the lands did not allow the lands to be charged to the respondent. The restriction in interest stated that the lands could not, inter alia, be charged without the prior consent of the state authority having been obtained. There was, however, an exception to the restriction: the lands could be charged to any bank or financial institution that was listed under Schedule D of the Kelantan Malay Reservations Enactment 1930 and Schedule 26A of the Kelantan Land Enactment 1938 to enable the owner of the lands to obtain a personal loan. The appellant argued that (i) the respondent was not a 'bank or financial institution' described in the said exception and (ii) since the loan in the instant case was for the benefit of a third party and not for the owner of the lands, the exception to the said restriction in interest did not apply. The instant appeal was against the High Court's dismissal of the OS.

Held, dismissing the appeal with costs of RM5,000:

(1) The charge on the lands was valid and enforceable. Schedule D to the Kelantan Malay Reservations Enactment 1930 and Schedule 26A to the Kelantan Land Ordinance 1938 clearly listed Takaful Nasional Sdn Bhd (the previous name of the respondent) as one of the institutions to whom

land in Kelantan could be charged. There was therefore no doubt the respondent was a financial institution to whom the lands could be charged under the exception to the restriction concerning the charging of the lands (see paras 42, 44 & 49).

(2) The respondent was a takaful entity and it must have been registered, at the material time, under the Takaful Act 1984. Under that Act, 'Takaful' was defined as 'a scheme based on brotherhood, solidarity and mutual assistance which provides for mutual financial aid and assistance to participants in case of need whereby the participants mutually agree to contribute for that purpose'. Based on that definition, the respondent would be a financial institution in the wider sense of an institution that provided financing (see paras 36–37).

(3) As the state authority had consented to the lands being charged, that consent read together with the exception to the restriction on the charging of the lands meant the state authority had consented to the charging of the lands to the respondent with full knowledge that the purpose of the charge was to secure a loan to the third party (see paras 46–48).

[Bahasa Malaysia summary

Perayu menggadai dua lot tanahnya ('tanah') kepada responden untuk menjamin pinjaman responden kepada pihak ketiga. Apabila responden memperolehi perintah jualan tanah tersebut, perayu memohon kepada Mahkamah Tinggi melalui saman pemula ('SP') untuk mengisytiharkan gadaian tersebut adalah tak sah dan untuk mengetepikan perintah jualan. Perayu berhujah bahawa gadaian adalah batal dan tak sah kerana sekatan dalam faedah atas hakmilik kepada tanah tersebut tidak membenarkan tanah digadaikan kepada responden. Sekatan dalam faedah menyatakan bahawa tanah tidak boleh, antara lain, digadaikan tanpa izin terdahulu daripada pihak berkuasa negeri diperolehi. Walau bagaimanapun, terdapat pengecualian kepada sekatan; tanah tersebut boleh digadaikan kepada mana-mana bank atau institusi kewangan yang disenaraikan di bawah Jadual D Enakmen Rizab Melayu Negeri Kelantan 1930 dan Jadual 26A Enakmen Tanah Negeri Kelantan 1938 untuk membolehkan pemilik tanah memperolehi pinjaman peribadi. Perayu berhujah bahawa (i) responden bukan 'bank or financial institution' yang diterangkan di dalam pengecualian tersebut dan (ii) memandangkan pinjaman dalam kes ini adalah untuk faedah pihak ketiga dan bukan pemilik tanah, pengecualian kepada sekatan dalam faedah tersebut tidak beraplikasi. Rayuan ini adalah terhadap penolakan SP oleh Mahkamah Tinggi.

Diputuskan, menolak rayuan dengan kos RM5,000:

(1) Gadaian tanah tersebut adalah sah dan boleh dikuatkuasakan. Jadual D kepada Enakmen Rizab Melayu Negeri Kelantan 1930 dan Jadual 26A

Enakmen Tanah Negeri Kelantan 1938 jelas menyenaraikan Takaful Nasional Sdn Bhd (nama terdahulu responden) sebagai satu institusi di mana tanah Negeri Kelantan boleh digadaikan. Oleh itu tidak terdapat kesangsian responden adalah institusi kewangan di mana tanah boleh digadaikan di bawah pengecualian kepada sekatan berkenaan gadaian tanah (lihat perenggan 42, 44 & 49).

(2) Responden adalah entiti takaful dan ia mesti didaftarkan, pada masa material, di awah Akta Takaful 1984. Di bawah Akta tersebut, 'Takaful' didefinisikan sebagai 'a scheme based on brotherhood, solidarity and mutual assistance which provides for mutual financial aid and assistance to participants in case of need whereby the participants mutually agree to contribute for that purpose'. Berdasarkan atas definisi tersebut, responden adalah institusi kewangan dalam maksud yang lebih luas sebuah institusi yang memberikan kemudahan kewangan (lihat perenggan 36–37).

(3) Memandangkan pihak berkuasa negeri telah mengizinkan tanah tersebut digadaikan, izin tersebut dibaca bersama dengan pengecualian kepada sekatan atas gadaian tanah tersebut bermaksud bahawa piahk berkuasa negeri telah mengizinkan gadaian tanah tersebut kepada responden dengan pengetahuan penuh bahawa tujuan gadaian adalah untuk menjamin pinjaman kepada pihak ketiga (lihat perenggan 46–48).]

Notes

For cases on validity of charge, see 8(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2954–2966.

Legislation referred to

Kelantan Land Enactment 1938 s 104, Schedule 26A
Kelantan Malay Reservations Enactment 1930 s 9A, Schedule D
National Land Code s 417, Form 16A
Takaful Act 1984 (Revoked by Islamic Financial Services Act 2013)

Appeal from: Originating Summons No 24NCVC-66–11 of 2011 (High Court, Kota Bharu)

Mahinder Singh Dulku (Mahinder Singh Dulku & Co) for the appellant.
Mohd Rosly Khadi bin Mohd Ayub Khan (Hisham, Sobri & Kadir) for the respondent.

Zaharah Ibrahim JCA (delivering judgment of the court):

INTRODUCTION

[1] This was an appeal from the decision of the High Court of Malaya at Kota Bharu dismissing the appellant/plaintiff's claim, made by way of originating summons, for a declaratory order to set aside the memorandum of charge under s 417 of the National Land Code and the order for sale dated 22 August 2010 made in favour of the respondent/defendant. For ease of reference the parties will be referred to as they were in the High Court.

[2] We heard the appeal on 21 June 2013 and unanimously dismissed the appeal.

[3] Our brother Anantham Kasinather JCA, has since retired.

[4] Before hearing the appeal, counsel for the defendant sought my recusal as I was on the panel that heard and allowed the appeal by the plaintiff on 31 May 2012 against the order of the High Court striking out the originating summons. I declined to recuse myself as that panel did not deal with the merits of the case.

BACKGROUND

[5] The plaintiff had executed a memorandum of charge (Presentation No 848/2003) in respect of two properties, namely, Lots 1011 and 1012, Mukim Jeli Tepi Sungai, Daerah Jeli, Kelantan, ('subject lots') held under State Lease 1240 and State Lease 1241, respectively. The memorandum of charge was registered on 9 April 2003.

[6] The defendant applied by way of originating summons for an order for sale of the subject lots.

[7] Before the High Court hearing the application for order for sale, issues of forgery of the plaintiff's signature on the memorandum of charge and issues of the charge being for the benefit of a company called SKKP (Tanah Merah) Development Sdn Bhd were raised. The learned High Court judge converted the originating summons into writ action and heard evidence thereon.

[8] On 22 August 2010, an order for the sale 'Order for Sale' of the two subject lots was made by the High Court at Kota Bharu. The initial date for public auction of the subject lots was fixed for 22 October 2010.

[9] The plaintiff filed a notice of appeal to the Court of Appeal, but neglected to file and serve the record of appeal within the prescribed time. A

[10] The plaintiff then applied by way of a notice of motion (encl 7a) to the Court of Appeal for extension of time to file and serve the record of appeal, and had also at the same time filed a motion (encl 6a) for the stay of execution of the order for sale. B

[11] On 14 November 2011, both motions were dismissed by the Court of Appeal. The deposit of RM500 paid by the plaintiff was ordered to be the costs to be paid to the defendant. C

[12] The result of the dismissal of the two motions was that the plaintiff's appeal against the order for sale was impliedly struck out. D

[13] Meanwhile, on 2 November 2011, while his motions in encls 7a and 6a were still pending in the Court of Appeal, the plaintiff filed an application by way of originating summons (encl 2), seeking the following orders:

(a) that the memorandum of charge under Presentation No 848/2003 be cancelled and removed from the register and issue documents of title of the subject lots; and E

(b) that the order for sale be set aside forthwith and the originating summons pursuant to which the order for sale was made be dismissed with costs. F

[14] The High Court struck out the plaintiff's encl 2 on the grounds of res judicata. Against that decision the plaintiff appealed to this court and that appeal was allowed on 31 May 2012. The case was remitted to the High Court to be heard on its merits. This was the appeal referred to in para 4 above. G

[15] After full hearing of encl 2, the High Court dismissed encl 2. This appeal before us was the appeal against that decision after full hearing. H

ISSUES BEFORE THE HIGH COURT

[16] The main ground given by the plaintiff for his application was that the charge over the subject lots contravened the restriction in interest endorsed on the document of title and that therefore the charge was null and void and had no effect. I

[17] The titles for the subject lots were endorsed with the following restrictions in interest:

A Tanah yang terkandung dalam hakmilik ini tidak boleh dipindahmilik, digadai, dipajak atau dibuat apa jua perkiraan dengan tidak terlebih dahulu mendapat Kebenaran Bertulis daripada Pihak Berkuasa Negeri.

Tanah yang terkandung dalam hakmilik ini tidak boleh dipecah sempadan, dipecah bahagian atau dicantum dengan tidak terlebih dahulu mendapat Kebenaran B Bertulis daripada Pihak Berkuasa Negeri.

[18] However, the restriction on the charging of the subject lots was subject to the following exemption:

C Tanah yang terkandung dalam hakmilik ini dikecualikan bagi gadaian kepada Bank atau Institusi Kewangan yang disenaraikan di dalam Jadual D Enakmen Rizab Melayu Kelantan 1930 dan Jadual 26A Enakmen Tanah Kelantan 1938 bagi membolehkan tuan tanah mendapat pinjaman sendiri.

D **[19]** The state authority had given its consent for the subject lands to be charged to the defendant, but the consent was given to SKKPJ (Tanah Merah) Development Sdn Bhd ('SKKPJ'), not to the plaintiff.

[20] It was argued before the High Court by the plaintiff that the defendant E was neither a bank nor a financial institution but an insurance company and therefore could not come within the exemption.

[21] It must be noted that before the High Court, the issue of the plaintiff's F signature having been forged was not raised in submissions.

[22] However, quite unfortunately, the entire judgment of the learned High Court judge was devoted to the issue of forgery.

G GROUNDS OF APPEAL

[23] The plaintiff's grounds in his memorandum of appeal were confined only to the issue of invalidity of the charge as it was a third party charge by SKKPJ who was not the proprietor of the subject lots, to the defendant which H was not a bank or financial institution.

[24] The plaintiff contended that the learned High Court judge had failed to appreciate the true basis of the prayers in the originating summons in encl 2.

I DECISION

[25] We agreed with the plaintiff that the learned High Court judge had failed to appreciate that the application in encl 2 was based purely on the plaintiff's contention that the charge over the subject lots was invalid.

[26] The sole issue before us therefore was whether the charge registered over the subject lots was valid.

WHO CHARGED THE SUBJECT LOTS?

[27] The copies of the issue documents of title for the subject lots exhibited by the plaintiff in his affidavits showed very clearly that the person who charged the subject lots was the plaintiff himself.

[28] Form 16A exhibited as exh 'TM-2' to the plaintiff's affidavit indicated that the plaintiff charged the subject lots as security for an Islamic financing facility granted by the defendant to SKKPJ.

[29] Therefore, the fact that the chargor of the subject lands was the plaintiff himself as the registered proprietor of the lots was not in dispute.

[30] The issue of whether his signature was forged had been raised in the earlier proceedings as being cause to the contrary to resist the application for order for sale. That challenge ended with the Court of Appeal orders dated 14 November 2012.

[31] In any case, the issue that the plaintiff was not the person who signed the memorandum of charge was not raised in the memorandum of appeal or during submissions before us.

WAS THE DEFENDANT A BANK OR FINANCIAL INSTITUTION?

[32] The exemption to the restriction on the charging of the subject lots was:

> Tanah yang terkandung dalam hakmilik ini dikecualikan bagi gadaian kepada Bank atau Institusi Kewangan yang disenaraikan di dalam Jadual D Enakmen Rizab Melayu Kelantan 1930 dan Jadual 26A Enakmen Tanah Kelantan 1938 bagi membolehkan tuan tanah mendapat pinjaman sendiri.

[33] The plaintiff argued that as the defendant was neither a bank nor a financial institution, the subject lots could not be charged to the defendant.

[34] The defendant was not a bank. That much was not in dispute. Was it however a financial institution for the purposes of the exemption to the restriction in interest?

[35] The term 'financial institution' was not defined in the National Land Code, or the Kelantan Land Enactment 1938 (of which s 104 dealing with sale and charge of land was among the provisions saved from repeal by the National

Land Code), or the Kelantan Malay Reservations Enactment 1930.

[36] The defendant was a takaful entity. It must have been registered, at the material time, under the Takaful Act 1984. Under that Act, 'takaful' is defined as follows:

> 'takaful' means a scheme based on brotherhood, solidarity and mutual assistance which provides for mutual financial aid and assistance to participants in case of need whereby the participants mutually agree to contribute for that purpose;

[37] In our view, based on that definition, the defendant would be a financial institution in the wider sense of an institution providing financing.

[38] The fact remained that when the memorandum of charge was presented in 2003, the land office accepted the memorandum and registered the charge. The land office would be, in our view, the best authority to know if the defendant, in whose favour the memorandum of charge was executed, was an institution listed in Schedule D to the Kelantan Malay Reservations Enactment 1930 or Schedule 26A to the Kelantan Land Enactment 1938.

[39] During the hearing of the appeal, we sought assistance from the parties to produce before us the said Schedules but neither side was able to do so.

[40] We had on our own obtained from the court's library a copy of the Enactments.

[41] A close examination of Schedule D to the Kelantan Malay Reservations Enactment 1930 and Schedule 26A to the Kelantan Land Enactment 1938 showed that there were within the lists in the Schedules bodies that would not ordinarily be construed to be financial institutions. Examples of those were Lembaga Perancang Keluarga Negara Malaysia and PETRONAS.

[42] More importantly however, Schedule D to the Kelantan Malay Reservations Enactment 1930 and Schedule 26A to the Kelantan Land Enactment 1938 clearly listed Takaful Nasional Sdn Bhd (the previous name of the defendant) as one of the institutions to whom land in Kelantan may be charged.

[43] Takaful Nasional Sdn Bhd was added to the lists by way of orders made under s 9A of the Kelantan Malay Reservations Enactment 1930 and s 104 of the Kelantan Land Enactment 1938 and published in the Kelantan State *Gazette* on 10 May 2001 as Kn PU15 and Kn PU16 of 2001, respectively.

[44] There was therefore no doubt that the defendant was a financial institution to whom the subject lots could be charged under the exemption to the restriction to the charging of the subject lots.

THIRD PARTY CHARGE

[45] The charge was without doubt a third party charge. The plaintiff's argument was that as it was a third party charge, the exemption to the restriction in interest did not apply since that exemption applied only 'bagi membolehkan tuan tanah mendapat pinjaman sendiri' (to enable the proprietor to obtain a loan for himself).

[46] It was not in dispute that the state authority had given its consent to the subject lots to be charged, although the consent was for SKKPJ to charge the land to the defendant.

[47] In our view, the consent for the charging of the subject lots would satisfy the condition in the restriction 'Tanah yang terkandung dalam hakmilik ini tidak boleh dipindahmilik, digadai, dipajak atau dibuat apa jua perkiraan dengan tidak terlebih dahulu mendapat Kebenaran Bertulis daripada Pihak Berkuasa Negeri' despite SKKPJ being named as the proposed chargor.

[48] This consent, read together with the exemption to the restriction on the charging of the subject lots, and the fact that the plaintiff was the chargor named in the memorandum of charge, could only mean one thing:

> the State Authority consented to the charging of the Subject Lots to the Defendant (an institution named in the Schedules D and 26A to the relevant Enactments) with full knowledge that the purpose of the charge was to secure a loan given to SPPKJ.

CONCLUSION

[49] On the basis of the above analysis, we found that the charge of the subject lots was valid and enforceable. We therefore dismissed this appeal with costs of RM5,000.

Appeal dismissed with costs of RM5,000.

Reported by Ashok Kumar